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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of the Application of
E. C. EVANS,
For a Review of a Decision of the Board of United States General Appraisers, dated October 24th, 1899, as to the Duty to be paid on Certain Anthracite Coal.

No. 621.

BRIEF FOR APPELLEE.

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THE STAR PRESS—JAS. H. BARRY—SAN FRANCISCO.

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BRIEF FOR APPELLEE.

With all due deference to the learned counsel for appellant, and without wishing in the least to treat disparagingly the ingenious argument he presents in support of the proposition that "all" anthracite coal should be admitted into this country free of duty, we respectfully submit that the entire question as to the dutiability of anthracite coal under paragraphs 415 and 523 of the Tariff Act of July 24, 1897 (30 Stat. at Large, p. 151, popularly known as the Dingley Act), is concluded and foreclosed by the decision of this Honorable Court in *Coles* vs. *Collector of Customs of the Port of San Francisco,* reported in 100 Fed., 442. The case of *Coles* vs. *Collector of Customs of the Port of*

San Francisco is a companion case with the one now before this Court, and it involved precisely the same propositions of fact and of law. The decision in that case was unanimously rendered, and affirmed the decision of the U. S. Circuit Court for the Northern District of California (for opinion of lower Court in that case, see 95 Fed., 954). The lower Court had affirmed the decision of the Board of U. S. General Appraisers.

When this Honorable Court affirmed the decision of the lower Court, counsel for appellant filed a petition for a rehearing, and reinforced it with supplemental petitions or briefs. The important point raised and urged to obtain a rehearing was the same which counsel now advances, viz: that the decision of the Supreme Court of the United States in the case of *Chew Hing Lung* vs. *Wise,,* rendered January 22, 1900, and reported in 177 U. S., 156, settled the law of the case. It was contended then, and it is now, that certain conclusions, which the Supreme Court of the United States arrived at in that case, govern the question of statutory interpretation involved in the case at bar.

This Honorable Court is thoroughly familiar with the case of *Chew Hing Lung* vs. *Wise.* It was, therefore, fully advised when it denied the petition for a rehearing.

Counsel then applied to the Supreme Court of the United States for a writ of certiorari. Briefs on both sides were submitted, and the Supreme Court denied the application (177 U. S., 695).

Under the circumstances, we do not think it necessary to reply to counsel at any length. We, however, take the

liberty of referring the Court to our brief submitted in the Coles case.

There is no dispute that the coal in controversy is anthracite coal containing less than ninety-two per centum of fixed carbon.

The question of law raised by counsel is so completely and effectively answered by Hon. John K. Richards, Solicitor-General, in the brief written by him in opposition to the petition filed in the Supreme Court of the United States for a writ of certiorari, that we take the liberty of incorporating his argument in this brief. The learned Solicitor-General said:

"The somewhat refined argument made by counsel for
" the importer on the analogy drawn between this case and
" the case of *Chew Hing Lung* vs. *Wise, Collector*, decided
" by the Court at this term, is unsound, and cannot be sus-
" tained. There, the Court, having found that tapioca
" flour is one of the forms of tapioca which was entitled to
" a free entry, held that the substance was *designated* by
" the term tapioca, and although it might be fit for use as
" starch, and be included in a *general description* of 'pre-
" 'parations from whatever substance produced fit for use
" 'as starch,' embraced in a paragraph laying duty on
" starch, nevertheless the designation and not the general
" description fixed its status. But there the rule was ap-
" plied to a case where the contrast was between two en-
" tirely different substances, viz, *tapioca and starch.* Here,
" however, there is no contrast, but a smaller sub-class,

" namely, *anthracite coal,* is carved out, as entitled to free " entry under certain circumstances, from the general duti- " able class of *all coals.*

"In other words, there is designation, and nothing but " designation, both in the dutiable paragraph and the para- " graph of the free list—in one, a broad but definite desig- " nation, including this coal, and in the other a subsidiary " and related designation, giving the limited right of free " entry. It is not true that the dutiable paragraph is mere " general description or descriptive classification, while the " free-list provision is specific designation. Therefore, the " rule of the decisions giving designation preference over " description does not apply. *All coals* are *designated* as " subject to duty when containing less than a certain per- " centage of fixed carbon; while *anthracite coal,* a part and " variety of *all coals,* is entitled to free entry if 'not " 'specially provided for in this Act.' If the proportion of " anthracite coals which contains less than 92 per cent. of " fixed carbon was not specially provided for in paragraph " 415, it is difficult to understand the meaning of either " paragraph; and that is the same as to say that language " could not more clearly and accurately sustain the inten- " tion of Congress and the contention of the Government " that such cargoes of coals as are here involved should pay " duty."

We concur in the closing sentiment expressed by the Honorable Solicitor-General in his brief, that the import- er's arguments can only be viewed as an illustration of the possibilities of ingenious logic.

We respectfully submit that the judgment of the lower Court must be affirmed.

MARSHALL B. WOODWORTH,
Assistant U. S. Attorney.

FRANK L. COOMBS,
U. S. Attorney.

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Appellant's Closing Brief.

SMITH & PRINGLE,
Attorneys for Appellant.

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APPELLANT'S CLOSING BRIEF.

The appellee's brief, besides repeating the criticism that our argument is "ingenious", "somewhat refined" and an "illustration of the possibilities of ingenious logic", cites from the brief of the Solicitor-General certain passages which are presented as a complete and effective answer to what has been said by us concerning the analogy between the Coles case and that of Chew Hing Lung.

The Solicitor-General attempts to distinguish these

two cases by saying, that in the Chew Hing Lung case "the contrast was between two entirely different substances, viz: tapioca and starch", but that in the Coles case there was "no contrast, but a smaller subclass, namely, anthracite coal, is carved out, as entitled to free entry under certain circumstances, from the general dutiable class of all coals".

So the Solicitor-General says that the *Wilson Act* presented a contrast between two substances, tapioca and starch, and the *Dingley Act* carves out of a general class, all coals, a subclass, anthracite.

Neither one of these statements is correct. The contrast of the *Wilson Act* is not between tapioca and starch, but between "all preparations fit for use as starch" and tapioca flour, one of many preparations fit for use as starch; and anthracite, the commercial and scientific name of a certain kind of coal, is no more a subclass of all coals than tapioca, the name of a certain substance fit for use as starch, is a subclass of all substances fit for such use. It must be readily seen that neither "tapioca" nor "anthracite" is a subclass in any sense of the word. Both are specific mentions of certain things by name, which are not classified at all, but, by reason of their being denominatively designated and not described, are taken out of and excepted from all classification, and belong to no division or subdivision of things having common qualities.

The Solicitor-General contents himself with saying

that "it is not true that the dutiable paragraph is mere "general description or descriptive classification", but he does not trouble himself to give a reason why it is not true, or to discuss or answer the reasons which we have given for holding the dutiable paragraph to be descriptive classification.

The Court will observe that this is the only reply to our contention made by one of the chief law officers of the Government, and will perhaps agree with us in thinking that the answer is neither ingenious, nor refined, nor an illustration of the possibilities of logic.

But, as the law officers of the Government persist in holding up the appellant's contention as possessed of no merit beyond that of an over-refined logical ingenuity, we shall, at the risk of being tedious, present a short summary of it, humbly begging counsel to point out upon the oral argument precisely where the reasoning ceases to be logical and becomes something else, merely ingenious, or unduly refined, or an illustration of the subtleties of logic.

Summary.

The *Dingley Act* provides that all coal containing less than ninety-two per cent of fixed carbon shall pay duty.

If the act stopped here, there would be no room for discussion, as the imported article, being coal having less of fixed carbon than the percentage named in the

act, would be clearly within its terms.

The act does not stop here, however, but provides that anthracite shall be free.

If the act stopped here, again, there would be still no room for discussion, as we should then have the case of a designation of an article *eo nomine*, which, under the well-established rule, must prevail over a general description that would otherwise embrace it.

The logical method of reading the statute, if it were so written, would be to regard it as if it were written: all coals containing less than ninety-two per cent of fixed carbon, except anthracite.

This Court did indeed say in the Coles case that such a method of reading the statute would be an *amendment* of the statute. But the remark was probably inadvertent, as to so read the statute would be not to amend it, but to *construe* it, and so to give effect to all its provisions, as is necessarily done in every case where a general description is harmonized with a denominative mention. It is always said that a designation of a thing *eo nomine* must prevail over a general description which would otherwise include or embrace the thing named. But if the general description is not allowed to include or embrace the thing named it must be because the thing named is *excepted* from the general description.

102 U. S. 212;
176 U. S. 159.

The general rule of construction, so often cited in this and similar cases, may be thus simply stated:

When provision is made for a class of things, and then another provision is made for a particular thing, designated by name, belonging to the class, the particular thing so designated is excepted from the class.

But the act does not stop here. It says that anthracite shall be admitted free, unless otherwise specially provided for in the act.

Now the Supreme Court says (176 U. S. 160) that these words are to be taken literally, strengthen the denominative mention of anthracite, and are an added declaration that anthracite shall be free, so that anthracite *shall* be free unless it is somewhere else in the act specially subjected to duty.

(This ruling differs utterly from this Court's ruling in the Coles case, that the words in question qualify the denominative mention of anthracite.)

We must, therefore, look for a special provision elsewhere in the statute applicable to anthracite.

This Court found such a special provision in the clause concerning "all coals containing less than ninety-two per centum of fixed carbon", which in the Coles case was declared to be such a special provision because the expression "*all* coal" was comprehensive enough to include anthracite. (100 Fed. 442, 444.)

But this cannot be a good reason, because every generally descriptive clause which was ever held to be con-

trolled by a mention *eo nomine* was comprehensive enough to include the article denominatively designated.

96 U. S. 109;
96 U. S. 144.

We must therefore seek another reason for regarding the clause concerning the percentage in carbon as a special provision for anthracite.

The Coles case is not the only case in which this Court has treated a comprehensive phrase as a special provision. In the tapioca case (83 Fed. 165) this Court held that the comprehensive phrase "all preparations, " from whatever substance produced, fit for use as " starch " was a specific provision for tapioca.

The reason given by this Court was, not that the phrase was comprehensive enough to include tapioca, but that it was a phrase similar to "all substances expressly used for manure" which, in *Magone* vs. *Heller*, 150 U. S. 70, had been made to control the denominative mention of sulphate of potash.

The Supreme Court held, however (176 U. S. 159), that the phrase was not similar to the one before the Court in *Magone* vs. *Heller*.

So that there are two kinds of general comprehensive clauses. One kind is controlled by a denominative mention. The other kind is not controlled by a denominative mention.

In the distinction between these two kinds of com-

prehensive phrases is to be found the key to the solution of the question in this case.

"All preparations fit for use as starch" was held by the Supreme Court to be a descriptive phrase like the phrases considered in a number of cases before the Court prior to *Magone* vs. *Heller*, and, because it was a descriptive phrase, it was made to yield to a mention of an article *eo nomine*.

"All substances expressly used for manure" was held by the Supreme Court to be not a descriptive phrase, and was therefore held to control a mention of an article *eo nomine*.

The reason for this is that "all substances used for manure" do not constitute a *class* of things. The phrase is a provision for all things coming within its terms without regard to their classification.

The distinction, therefore, is between a descriptive phrase and one which is not descriptive.

But a descriptive phrase is one which classifies things by reference to attributes or qualities which they have in common.

A phrase which does not classify, which does not group articles by reference to their common qualities, is not descriptive.

Therefore, the question of this case is whether "all "coals containing less than ninety-two per cent of "fixed carbon", is or is not descriptive.

If it is descriptive, it must, like the phrase before the Court in the tapioca case, and the phrases before the Court in the cases prior to *Magone* vs. *Heller*, yield to the denominative mention of anthracite.

If it is not descriptive, then, like the phrase in *Magone* vs. *Heller*, it is a specific provision, and must control the denominative mention of anthracite.

But that it is purely descriptive is beyond dispute, as it deals only with a quality which certain coals have in common, namely, percentage in fixed carbon. It is descriptive in the very same way and sense as "preparations fit for use as starch" was descriptive, because that phrase deals only with a quality which certain preparations have in common, namely, fitness for use as starch.

It is, therefore, not a special provision for anthracite, any more than "preparations fit for use as starch" was a special provision for tapioca.

Both phrases describe *classes* of things, from which, under the rule, things particularly mentioned by name, belonging to the class, are to be excepted.

Respectfully submitted,

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